

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Protecting Against National Security Threats to	)	WC Docket No. 18-89
the Communications Supply Chain Through	)	
FCC Programs	)	

**COMMENTS OF  
USTELECOM – THE BROADBAND ASSOCIATION**

**I. INTRODUCTION AND SUMMARY**

USTelecom — The Broadband Association (USTelecom)<sup>1</sup> submits these comments to support the Federal Communications Commission (Commission) applying section 889(b)(1) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019<sup>2</sup> (2019 NDAA) to the programs it oversees.<sup>3</sup> Such a step is consistent with the “whole of government” approach that USTelecom supports in federal supply chain efforts.

USTelecom has previously supported the Commission’s goal to avoid using Universal Service Fund (USF) support to fund equipment and services provided by companies that threaten American national security interests. Yet given the Commission’s limited capabilities of determining which companies constitute a threat to national security, USTelecom established four principles for the Commission to use in its analytical framework in the supply-chain context:

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<sup>1</sup> USTelecom is the premier trade association representing service providers and suppliers for the telecom industry. Its diverse member base ranges from large publicly traded communications corporations to small companies and cooperatives – all providing advanced communications service to both urban and rural markets.

<sup>2</sup> John S. McCain National Defense Authorization Act for Fiscal Year 2019, H.R. 5515, 115<sup>th</sup> Cong., PL 115-232, 132 Stat. 1636 (2018).

<sup>3</sup> *Wireline Competition Bureau Seeks Comment on Section 889 of John S. McCain National Defense Authorization Act for Fiscal Year 2019*, WC Docket No. 18-89, Public Notice, DA 18-1099 (WCB Oct. 26, 2018).

- Balancing the national security and commercial interests intertwined with the supply chain require substantial and continual federal government coordination. The Commission must closely coordinate all of its actions in this field across the federal government.
- The Commission is not in the best position to determine the threats to and vulnerabilities of the communications supply chain; it should rely heavily on other federal agencies, particularly the Department of Homeland Security (DHS), to make its determinations about appropriate prospective restrictions and remedial measures where suspect equipment exists today.
- Any restrictions on the use of USF funding should be prospective, taking into account existing equipment and a level playing field.
- The Commission should confine the scope of any rule to apply only to equipment and services funded through the Universal Service Fund in order to stay clearly within the bounds of its legal authority.<sup>4</sup>

It would be consistent with these principles for the Commission to follow Congressional direction and apply the 2019 NDAA to its universal service program.

At the same time, USTelecom continues to encourage the FCC to participate in other cross-governmental efforts with respect to the supply chain, particularly with the recently-founded DHS ICT Supply Chain Task Force,<sup>5</sup> and mindful of other federal activity in this space.

## **II. APPLYING THE 2019 NDAA LANGUAGE WOULD HELP BRING CONSISTENCY IN FEDERAL SUPPLY CHAIN MANAGEMENT**

By framing “heads of executive agencies” as the targets of its directives, Congress clearly intended the 2019 NDAA’s “prohibitions on certain telecommunications and video surveillance services or equipment” to have a broad application across the federal government.<sup>6</sup> USTelecom

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<sup>4</sup> USTelecom—The Broadband Association Comments, WC Docket No., 18-89 at 3 (filed June 1, 2018) (USTelecom Comments).

<sup>5</sup> The ICT (information and communications technology) Task Force is a “key element of the newly established DHS National Risk Management Center” that “will be comprised of representatives and subject matter experts from industry and Federal executive branch government agencies to examine and develop consensus recommendations for action to address key strategic challenges to identifying and managing risk associated with the global ICT supply chain and related third-party risk.” Department of Homeland Security, ICT Supply Chain Task Force (July 31, 2018).

<sup>6</sup> 2019 NDAA at § 889.

has previously expressed in this proceeding its “viewpoint that a ‘whole of government’ approach is particularly necessary in the context of supply chain risk management,” and the 2019 NDAA’s expansive application comports with that viewpoint.

To the extent that it is ambiguous as to whether the Commission is specifically included within the scope of the 2019 NDAA, the Commission should find that it would best serve Congressional direction by applying the statute to the Commission’s USF program. For example, any doubts about whether the Commission is included within the scope of “an Executive Agency,”<sup>7</sup> covered by the 2019 NDAA’s direction should be resolved by cross-referencing the statute itself. Section 889(b)(2) specifically speaks to “heads of executive agencies administering loan, grant, or subsidy programs, including the head[] of the Federal Communications Commission . . . .” It would be a frustrating read of the statute for the Commission to find that only this subsection, which specifically enumerates the Commission as one of the “executive agencies,” is applicable without also finding that all of the section’s references to “executive agencies” apply to the Commission. Instead, this subsection should be read to confirm that Congress intended to include it within its scope of “executive agencies,” also at issue in subsection (b)(1).<sup>8</sup>

Similarly, while USTelecom does not reach any conclusion about whether the USF program is a “grant” or “subsidy” program, it is clear from Congress including the Commission in the list of executive agencies that also provide funding for telecom programs<sup>9</sup> that it considers

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<sup>7</sup> The 2019 NDAA defines “Executive Agency” with “the meaning given the term” in 41 U.S.C. § 133. 2019 NDAA at § 889(f)(4). That section includes “an independent establishment.” We do not reach any conclusion about whether the Commission is an “independent establishment” here.

<sup>8</sup> See *Smith v. United States*, 508 U.S. 223, 244 (1993) (statutory interpretation is a “holistic endeavor.”).

<sup>9</sup> The statute directs the heads of “Department of Agriculture . . . the Small Business Administration, and the Department of Commerce,” which do or have funded telecom and/or broadband projects, to assist affected businesses in transitioning away from prohibited equipment. 2019 NDAA at § 889(b)(2).

the Commission’s USF program to be a “grant” or “subsidy” within the meaning of the statute. The Commission’s USF program, run under its Section 254 authority, is its only method of “administering a loan, grant, or subsidy” related to telecommunications equipment. Congress would not have included the Commission in such a list if it did not intend to include the Commission’s USF program within the scope of its directive—it would have no meaning if it did not apply in the USF context.

By affirming that it is covered within the scope of the 2019 NDAA, the Commission will harmonize its programs and actions with other Executive Branch agencies. For purposes of a “whole of government” approach, USTelecom’s initial comments also supported the use of the NDAA as an alternative decision-making tool that established clear standards but noted its limitations for evolving over time.<sup>10</sup> While these concerns remain, use of the NDAA will at a minimum bring greater federal stability into the supply chain process.

### **III. THE FCC SHOULD EXAMINE HOW THE STATUTE’S ELEMENTS BEST APPLY TO ITS PROGRAMS**

#### **A. The FCC Should Limit the USF Burden of Covered Equipment by Appropriately Scoping the Equipment at Issue and Focusing on Providing Affected Entities Remedial Technical Expertise**

In following the 2019 NDAA’s direction, the Commission should deprioritize directly funding replacement equipment for “covered” equipment<sup>11</sup> given existing pressures on the Fund. Section 889(b)(2) directs the Commission, among others, to “prioritize *available* funding and

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<sup>10</sup> USTelecom’s initial comments also supported the use of the NDAA as an alternative decision-making tool that established clear standards but noted its limitations for evolving over time. USTelecom Comments at 14. (“While not as precise a tool, legislation such as the [NDAA] can be useful in providing a public bright line standard of conduct upon which the FCC can base its decisions on what it will fund. The difficulty with relying on such a legislative standard is that the legislation is subject to change from year to year without a formal regulatory process to explain changes from one iteration to another. In any case, the list would need to be premised on the intelligence and experience from experts in the intelligence community and the Department of Defense, and made available in a public forum.”).

<sup>11</sup> 2019 NDAA at § 889(f)(3) (defining “covered telecommunications equipment or services.”).

technical support to assist affected businesses, institutions and organizations as is reasonably necessary for those affected entities to transition from covered communications equipment and services, to procure replacement equipment and services and to ensure that communications service to users and customers is sustained.”<sup>12</sup> The Commission has currently has, among other USF priorities, an open proceeding to “establish a budget that will allow for robust broadband deployment in rate-of-return areas while minimizing the burdens that contributions to the Universal Service Fund place on ratepayers and to bring greater certainty and stability to rate-of-return high cost funding, both in the near term and in the future.”<sup>13</sup> The most recent USF contribution factor climbed over 20 percent for the first time.<sup>14</sup> Competing priorities to, among other things, decrease the digital divide, while also constraining the amount ratepayers are contributing<sup>15</sup> has left virtually no “available” funding to expend towards replacement equipment, to the extent that funding for such purposes is even permissible under the Commission’s USF statutory authority.

One way that the Commission can minimize the need for additional funding to replace “covered” equipment is by acting quickly to implement the 2019 NDAA’s effective date. The more notice carriers have that the Commission is implementing the restrictions imposed by the

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<sup>12</sup> *Id.* at § 889(b)(2) (emphasis added).

<sup>13</sup> *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order, Third Order on Reconsideration, and Notice of Proposed Rulemaking, FCC 18-29, at para 6 (Mar. 23, 2018).

<sup>14</sup> *Proposed Fourth Quarter 2018 Universal Service Contribution Factor*, CC Docket No. 96-45, Public Notice, DA 18-944 (OMD Sep. 12, 2018).

<sup>15</sup> Commissioner O’Rielly, for example, has called for a USF budget cap and careful sizing of each USF program. Michael O’Rielly, Commissioner, FCC, Before the Hudson Institute (Feb. 6, 2018) available at <https://docs.fcc.gov/public/attachments/DOC-349048A1.pdf> (“With the total budget at record levels, it is time to consider how much we are willing to take from over taxed and fee extracted Americans. If the total budget cannot be increased further, and I don’t think it should be, we may be required to make some hard choices about the relative sizes of each of the programs.”).

2019 NDAA on covered equipment, the less reliance they should have on covered equipment when the NDAA's prohibitions go into effect in August 2020.<sup>16</sup>

Another way that the Commission can minimize the need for managing or mitigating covered equipment is to confirm the 2019 NDAA's limitations on what is considered "covered equipment." The statute states that nothing in the relevant part "shall be construed" to "cover telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles."<sup>17</sup> The Commission should confirm this common-sense approach to what is included in the extent of "covered equipment." This subsection effectively limits the need to replace equipment that is improbable for implicating threats to national security. For example, a strand of fiber manufactured by one of the covered entities has no independent capability to route or redirect traffic that would impact national security and thus is not a priority for remediation, even though it was sold by a covered entity. By confirming this limitation of "covered telecommunications equipment or services," the Commission can effectively narrow the scope of the equipment and services even at issue under the terms of subsection 889(b)(2). Further, confirming that the 2019 NDAA's prohibition is limited to U.S. Eligible Telecommunications Carriers and does not include foreign affiliates, will also help limit the scope of the equipment at issue for replacement and/or mitigation.

In lieu of additional funding to replace equipment, the Commission should consider offering, in partnership with the Department of Homeland Security, technical advice to "ensure that communications service to users and customers is sustained." Such an exercise would fit well within the "whole of government" construct, particularly as DHS has taken a lead on

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<sup>16</sup> See 2019 NDAA at § 889(c).

<sup>17</sup> *Id.* at § 889(b)(3)(B).

exploring and mitigating communications supply chain issues via their Task Force. A critical advantage of working with DHS is that it can offer companies the ability to participate in a risk assessment under the auspices of the DHS Protected Critical Infrastructure Information (PCII) program. PCII is designed to better enable collaboration between the private sector and DHS by creating a venue in which “infrastructure information voluntarily shared with DHS could be used for homeland security purposes, while simultaneously protecting the sensitive information from public disclosure.”<sup>18</sup> Using PCII effectively will be essential to any remediation efforts associated with “covered equipment.”

**B. It is Important for the FCC to Confirm that Carriers Are Not Responsible for the Equipment of Those Their Interconnection Partners.**

The Commission, as the expert agency on telecommunications networks, should confirm the 2019 NDAA’s finding that carriers are not responsible for the equipment of third party carriers with which they interconnect to complete a communication. The 2019 NDAA is plain on its face that it does not “prohibit the head of an executive agency from procuring with an entity to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements.”<sup>19</sup> To the extent the Commission applies this to its own programs, it should confirm the NDAA’s exception. As the Commission is well aware, a carrier can only control its own network and often relies on other carriers to complete a communication—whether that is because it does not serve the end customer, leases transport, or any other number of reasons. Carriers do not know, and cannot be responsible for, the equipment of the carriers with

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<sup>18</sup> See USTelecom Comments at 11-12. (“By statute and regulation, information that is determined to be PCII cannot: (1) be disclosed through a Freedom of Information Act request (nor similar state/local disclosure laws); (2) be disclosed in civil litigation; and (3) be used for a regulatory purpose.) (internal citations omitted).

<sup>19</sup> 2019 NDAA at § 889(b)(3)(A).

which they interconnect; the funding of a carrier should not be implicated by the choices of their interconnected carriers.

#### **IV. Conclusion.**

USTelecom continues to support the Commission's efforts to exercise good stewardship over its USF spending and emphasizes the need for a coordinated, "whole of government" approach to determining the entities and equipment types that constitute communications supply chain risks. It is appropriate for the Commission to view the 2019 NDAA's Congressional directive as an appropriate step in this direction.

Respectfully submitted,

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